UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

11/20/78

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	NRC Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING	)	50-500A
COMPANY	)	50-501A
(Davis-Besse Nuclear Power Station,	)	
Units 1, 2 & 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING	)	NRC Docket Nos. 50-440A
COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant, Units	)	
1 & 2)	)	

RESPONSE OF NRC STAFF TO APPLICANTS' COMMENTS ON THE RELEVANCE OF OHIO LEGISLATURE AMENDED HOUSE BILL NO. 577 TO THIS APPEAL

Well over one year after oral arguments were held in this pending appeal, Applicants have requested this Appeal Board to take judicial notice of an Ohio statute (Amended House Bill No. 577, hereinafter "the Bill") which was passed last March, over eight months ago. Over seven months ago the Governor of Ohio apparently signed the Bill into law. Although the law became effective in July of 1978, by its plain terms its provisions will not be fully implemented until approximately July of 1979 (Sec. 4933.87(B)).

Yet, when requested to provide a statement of the relevancy of this statute, which plainly has only an *in futuro* effect to the instant appeal, Applicants now contend that it:

> ...should once and for all dispose of the misguided attempts by DOJ, the NRC Staff, and the City of Cleveland to resurrect allegations of territorial division as a basis for imposing nuclear related license conditions. ("Ohio Applicant's Comments On the Ohio Statute Requiring Certification Of Exclusive Territories," (November 3, 1978)).

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As the complete territorial boundaries between OE and Toledo Edison (TE) were affected, and there were no exclusions for either wholesale or retail customers. Thus, the territorial allocation agreements applied both to wholesale and retail service.

2. OE had a territorial agreement with Ohio Power Company, which was in effect from (at least) 1966, DJ 519. This agreement was used to allocate and trade customers. 5 NRC 191.

3. Ohio Edison and CEI have had a territorial allocation agreement since 1964. 5 NRC 192-193.

4. TE also has a territorial agreement with Ohio Power Company (5 NRC at 214) and Consumers Power Company, (5 NRC at 215-216).

5. In a practice similar to OE's, TE also imposed territorial and customer allocation provisions in its wholesale contracts with municipal electric systems. 5 NRC 216-217. Moreover, these provisions had a demonstrated anticompetitive effect, 5 NRC 216, ff. 168.

6. CEI attempted, albeit unsuccessfully, to extract a territorial allocation agreement with Painesville. 5 NRC 177, ff. 177.

7. OE attempted to extract a territorial allocation agreement with Columbus and Southern Ohio Electric Company. The latter utility declined on the grounds of illegality. See 5 NRC 192, ff. 109.

It is clear, from the nature, operation, and enforcement of these, and like, territorial agreements engaged in by Applicants that they applied to all aspects of the utilities' business, i.e., to both wholesale and retail sales. This is particularly true as the locus of many of the agreements was centered in wholesale contracts with competing municipal

the municipal electric systems located in Ohio. Applicants have attempted to argue (Ohio Applicants' Comments..., p. 6, n.5) that competition between the municipal electric systems and Applicants is severely limited by Article XVIII, section 6, of the Ohio Constitution. Applicants contend that:

> The "surplus product limitation specified in Article XVIII, section 6 clearly precludes full or partial requirements wholesale customers ... from even lawfully serving any customers outside the [municipals'] corporate limits." (Ohio Applicants Comments, p. 6, n.5).

At no time have Applicants offered any legal citations to support this proposed conclusion of law. In fact, while Article XVIII, section 6 of the Ohio Constitution limits a municipal's surplus electric sales outside the municipal limits to 50% of the kilowatt hours sold inside the municipal limits, no case or commission has held that a municipal electric system which itself is a partial or full requirements purchaser can not possess such "surplus". As John White, an attorney and President of Ohio Edison testified:

> There was a question in our minds and it is something that has been discussed from time to time in Ohio for many years, whether a municipality which, in fact, had no means of producing might, indeed, have a surplus when all the electric energy it had available for sale had to be purchased in the first place. ... That was the question that was being kicked around then and has been kicked around from time to time since, but it has never been litigated in Ohio.
>
> I suppose since it hadn't been litigated, nobody can be sure he knows the answer. (White: Tr. 9525-9526).

More importantly, as the Staff reads Amended House Bill No. 577, the Ohio legislature was careful to preserve competition between Ohio municipal electric systems and other electric utilities in that state. At the outset of course, as is required by law, the Bill is only seeking to deal with

III. Summary

We are left, then, with the question posed by the Appeal Board as to the relevancy of this Bill to the instant appeal. The law although enacted, has not yet caused to be delineated retail service areas for the electric utilities who are subject to its provisions. Municipal electrical systems are not subject to the provisions of the Bill. Ipso facto, the Bill has no effect whatsoever on either competing municipal electric systems or on any utility during the period examined by the Licensing Board, 1965-1976. Quite properly, the Bill cannot seek to reach, let alone vindicate, the wholesale territorial allocation agreements engaged in by Applicants during the period examined by the Licensing Board. One of the clear "signals" the Bill does give, the Staff believes, is the unwillingness of the Ohio legislature to affect the competitive posture of municipal electric systems.

As to the future, if the Ohio Applicant companies establish retail territorial allocation agreements pursuant to the provisions of this Bill, and if it is concluded by a reviewing court or agency that such retail allocation agreements were compelled by the State acting as sovereign, then Applicants' may seek to invoke a Parker v. Brown defense, 317 U.S. 341 (1943) if such future retail agreements are challenged under the antitrust laws. 5/

5/ The evaluation of such a defense would necessarily include an examination of Goldfarb v. Virginia State Bar, 421 U.S. 733 (1975) and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the latter case holding, inter alia, that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity.

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CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF NRC STAFF TO APPLICANTS' COMMENTS ON THE RELEVANCE OF OHIO LEGISLATURE AMENDED HOUSE BILL NO. 577 TO THIS APPEAL in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 20th day of November 1978.

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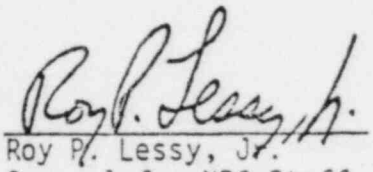

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